BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **DYNALECTRIC** 414 Brannan Street San Francisco, CA 94107 Employer	Docket No. 03-R1D1-4101 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

Dynalectric (Employer), whose full legal name at the time the citation involved in this proceeding was issued was Dynalectric Company, was among several contractors or subcontractors building a two tower high-rise condominium complex. Commencing on June 3, 2003, an Associated Safety Engineer for the Division of Occupational Safety and Health (Division) conducted a complaint inspection of the project. On October 15, 2003, the Division issued a citation which alleged three general violations of applicable occupational safety and health standards codified in California Code of Regulations, Title 8.[1] Employer timely appealed the citation, contesting on all available grounds and advancing several affirmative defenses.

A hearing was held before and Administrative Law Judge (ALJ) of the Board on April 18, 2006 and April 10, 2007. The ALJ issued his Decision on April 30, 2007. The Decision, as pertinent here, sustained two of the alleged violations and further rejected Employer's contention that the wrong or a non-existent entity had been cited. Employer then timely filed a petition for reconsideration, challenging the Decision insofar as it held the correct employer had been cited and sustained two of the alleged violations.[2]

[1] References are to California Code of Regulations, title 8, unless otherwise noted.
[2] The ALJ granted Employer's appeal of the third alleged violation, and Employer does not challenge that aspect of the Decision.

The Division did not answer the petition.

The Board took the petition under submission by Order of July 24, 2007.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole and resolved the issues presented correctly.

EVIDENCE

During the Division's inspection of the project, several of Employer's employees's held themselves out or otherwise identified Employer as "Dynalectric" and not as Dynalectric Company. For example, none of the documents the Division obtained during the inspection, which involved site visits on at least three different occasions, included the term "Company" after Dynalectric. The Division's inspector testified that the business cards he obtained from Employer's personnel during the inspection identified it as "Dynalectric." There was also testimony that Employer's name as listed on the California Secretary of State's website is Dynalectric Company, further identifying it as a corporation.

The first of the two sustained violations alleged a general violation of section 1526(d), which pertains to toilets at construction sites. It states:

> Toilet facilities shall be kept clean, maintained in good working order, designed and maintained in a manner which will assure privacy and provided with an adequate supply of toilet paper.

The evidence established that there were several half-sized portable toilets on various floors of the buildings which did not assure privacy because of their design and size. For example, the doors on the toilet portion of the units were lower than the sides, and the urinal portion completely lacked enclosure. Unless the whole unit was situated behind other objects or partitions which would provide a barrier to visibility, it would not provide privacy for use. The testimony further established that some of Employer's employees had used the half-sized toilets and also others had opportunity to do so. The toilets were placed at various floors of the buildings being constructed, and Employer's personnel stated there were 20 of its employees working on all floors of the project.

The other sustained violation alleged a violation of section 1630(a) because there was no construction passenger elevator installed at the project site, and at the time of inspection the building height exceeded 60 feet. Employer did not dispute the lack of an elevator or the height of the structure at the time of the inspection.

ISSUES

Whether Employer was properly cited at "Dynalectric."

Whether the evidence established Employer's employees were exposed to the condition of toilet facilities lacking adequate privacy.

Whether Employer was citable for the lack of a construction passenger elevator.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

1. Proper Employer

Case law in California holds there is no legal distinction between an entity's legal name and its fictitious business name. (*Pinkerton's Inc.* v. *Superior Court* (1996) 49 Cal.App.4th 1342, 1347-48.) Further, where service is otherwise properly made and the person served is aware that it is the person named as a defendant, jurisdiction is obtained. (See *Billings* v. *Edwards* (1979) 91 Cal.App.3d 826, 830.) We have adopted the foregoing principles and applied them to our proceedings. (*Western Door*, Cal/OSHA App. 01-2827, Decision After Reconsideration (Jun. 9, 2008).)

In *Western Door, supra*, we noted that when a business complies with the fictitious name requirements of section 17900 and following of the Business and Professions Code, it can be cited under either its corporate name or its fictitious business name. We further held that if a business does not comply with the requirements of those portions of the Business and Professions Code, it should not garner greater benefits than firms which comply with the law.

Employer held itself out to the general public, as well as to the Division, as "Dynalectric." One example of such holding out found in the record is the evidence that the business cards its employees used to identify themselves gave Employer's name as "Dynalectric," and not its formal corporate name of Dynalectric Company. Having held itself out as Dynalectric, it can be cited as such. (*Western Door, supra.*) Further, having done so, it cannot now claim the Division made a fatal error in citing it using the name by which it identified

itself to the Division. Were we to condone such a defense or practice, employers would have great incentive to be disingenuous in identifying themselves to Division inspectors. That would be an absurd result, which is to be avoided. (*Flannery* v. *Prentice* (2001) 26 Cal.4th 572, 578.)

This proceeding involved a single employer which used different names, or variations of its legal name, to self-identify. It is distinct from one "in which there is a legal distinction between the entity cited and the employer that allegedly violated a safety order." (*Western Door, supra*; compare *C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001) and *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001).)

We hold that the citation adequately named Employer.

2. Evidence of Exposure

As to the violation of section 1526(d), Employer argues in its petition that the evidence did not establish its employees were exposed to the portable toilets which did not provide adequate privacy.

The Division has the burden of proving employee exposure to the violative condition by a preponderance of the evidence. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).)

The ALJ credited the Division's testimony that the half-sized toilets did not afford the required privacy.

We find there is substantial evidence in the record to support the finding of exposure. First, the half-sized toilets were generally available on various floors of the building as it was being constructed. Second, the floors were open; the construction had not progressed to the point that interior walls had been erected. Thus, one of the toilets would expose anyone using it to a lack of privacy. Third, some of Employer's employees admitted to having used the deficient facilities, and others were observed working in locations where they were available. We conclude, as did the ALJ, that Employer's employees were exposed to the privacy-deficient toilets.

3. Construction Elevator Citation

It was not disputed in the hearing or in the petition for reconsideration that the building involved lacked the construction passenger elevator required by section 1630(a). Nor is it disputed that Employer was an electrical subcontractor on the project. Employer contended at hearing and before us

that it was not required or empowered to provide the elevator, pointing out that such was the obligation of the project's general contractor.

There was no dispute that Employer's employees worked in locations where the Safety Order required an elevator, that is, at building elevations above the 60-foot level. (See California Code of Regulations, Title 8, section 1630(a).) That uncontroverted fact made Employer an "exposing employer" under Labor Code section 6400(b)(1) [defining "exposing employer" at multiemployer worksites as employer whose employees were exposed to the hazard] and California Code of Regulations, Title 8, section 336.10(a) [same].)

We have held that an employer in a multiemployer situation may not be liable if it is unable to abate the violation. (See *The Office Professionals*, Cal/OSHA App. 92-604, Decision After Reconsideration (Jun. 19, 1995); *Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985).) Here Employer could have taken steps to eliminate its employees' exposure to the violation, and thus abate it. For example, Employer could have instructed its personnel to work below the 60-foot level until the elevator was installed and further informed the general contractor of the violation and its employee-protective response to it. There is no evidence Employer took either of those actions, or any other action to abate the violation by limiting its employees' exposure to it. Since Employer could have protected its employees even though it did not have the obligation or the contractual authority to install the required elevator, we find the Decision correctly found Employer violated section 1630(a) because it exposed its employees to the violation. Accordingly we affirm the Decision in that regard.

DECISION

The Decision of the ALJ is affirmed and reinstated in all respects.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member
VICKI MARTI, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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